

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES of AMERICA,

4 -against-

14 Cr. 462 (CS)

5 DENNIS SICA,

6 Defendant.

7 -----x
8 United States Courthouse
9 White Plains, New York

10 February 20, 2015

11 B e f o r e:

12 HON. CATHY SEIBEL,
13 District Court Judge

14 A P P E A R A N C E S:

15 SCOTT HARTMAN
16 BEN ALLEE

Assistant United States Attorneys

17
18 THEODORE GREEN
19 RICHARD WILLSTATTER
Attorneys for Dennis Sica

20
21 ALSO PRESENT:
22 Special Agent Louis Schmidt

23
24 ANGELA A. O'DONNELL, RPR
25 Official Court Reporter

Angela O'Donnell, RPR, 914-390-4025

P R O C E E D I N G S

THE COURT: All right, good afternoon, Mr. Hartman, Mr. Allee, Mr. Green and Mr. Willstatter and Mr. Sica. I guess we have a bunch of things to talk about; some discovery issues and our looming trial date. And I gather those issues overlap to an extent, to a significant extent. Let me just ask one question before we start because I want to talk about all the different issues individually. Is it still the Government's best guess we're talking about a two-week trial?

MR. HARTMAN: I mean, Judge, that's going to depend a little bit on the length of the crosses, but as far as our estimate of our case, I mean, we estimate 16 to 17 witnesses, so we think two weeks should be enough.

THE COURT: Well two weeks should be enough including cross or not including cross? I mean, giving your best guess.

MR. HARTMAN: Our best guess is that we will be done in two weeks.

THE COURT: All right. And Mr. Green, Mr. Willstatter, do you also think we're talking about two weeks or do you think longer? You're both very experienced --

MR. GREEN: It's very hard to say --

THE COURT: I'm not holding anybody to anything, I

1 just want your best guess.

2 MR. GREEN: It's hard to say, especially given
3 some of these open issues, but it could conceivably bleed
4 into next week or two, it's really hard to say.

5 THE COURT: I mean, two weeks sound a little bit
6 optimistic if everybody is really going to be slugging out
7 all these issues, but let's talk about them, and I guess I
8 will take them in the order they're raised in Mr. Green's
9 letter although some of them are sort of purely trial date
10 issues and some of them are discovery issues but we'll sort
11 it out.

12 First Mr. Green points out that the government has
13 recently, on the 6th of February, turned over what I gather
14 is the back-up for the lab reports on the drugs and this is
15 4500 pages and the defendant needs time to send that to a
16 defense expert. And I believe all that, I just am not clear
17 on why the five weeks or more that will have elapsed between
18 that disclosure and the trial is not enough for a defense
19 expert to do that. So I'm all ears.

20 MR. GREEN: Yes, well, your Honor, we copied the
21 4500 pages and we provided them to our toxicologist. There
22 were also some new information in one of the autopsy reports
23 which certainly ties in with the toxicology issue. You
24 know, we got them to him promptly and he has them.

25 THE COURT: But is he saying I can't possibly look

1 at these, this is too much for me to look at in the next
2 month? I mean, if I understand, a lot of the back-up is
3 computer generated test results and that sort of thing, it's
4 not like you're going to be pouring over it. I understand
5 your application --

6 MR. GREEN: Well, it took him a while, it took me
7 a while to get to fully get briefed on the original set of
8 lab reports which was only 37 pages.

9 THE COURT: Well that's where the real information
10 is. I mean, as I understand it, the back-up, the stuff that
11 you just got ties in to the conclusions that are in the
12 reports, and I understand you're entitled to have your
13 doctor, your expert check the work of the Government's
14 expert. I also understand your application for an
15 adjournment is based on a whole bunch of things besides
16 this.

17 MR. GREEN: Yes.

18 THE COURT: But I just want to understand with
19 respect to this narrow issue, your expert is not telling
20 you, I can't review this between now and March 16. He's not
21 said that.

22 MR. GREEN: Well, he hasn't told us when he's
23 going to be finishing the review. We got it to him as
24 quickly as possible.

25 THE COURT: I'm not doubting any of that.

1 MR. GREEN: So I don't have an estimate of when
2 he'll finish, your Honor, unfortunately.

3 THE COURT: Next Mr. Green's letter on page two
4 mentions that the government apparently inadvertently turned
5 over reports relating to drugs seized that the government
6 does not attribute to Mr. Sica but which were apparently
7 suspected of being similar in that they contain heroin and
8 fentanyl.

9 And the defense is now asking, if I understand
10 correctly, for any information that the government has about
11 heroin-fentanyl mixtures that were being distributed in
12 Dutchess County because I gather they may want to argue that
13 the drugs that killed the three victims in this case were
14 not the drugs that came from Mr. Sica, they came from
15 someone else or that the government hasn't proven that they
16 didn't come from someone else. And the Government's
17 response, as I understand it, is we're not arguing that the
18 fact that there's fentanyl mixed with the heroin means it
19 came from Mr. Sica, we're going to have witnesses who are
20 going to say it came from Mr. Sica and texts and other
21 evidence that it came from Mr. Sica, which doesn't mean that
22 the defendant still may not want to defend by saying the
23 drugs that killed the people weren't from Mr. Sica. So, the
24 parties are talking a little bit past each other as far as I
25 can tell.

1 I gather, and correct me if I'm wrong, that the
2 government is not going to dispute that other people in
3 Dutchess County in this timeframe of late 2013 early 2014
4 were selling heroin that had fentanyl in it.

5 MR. HARTMAN: That's correct, Judge. I believe
6 the two exhibits that were produced actually just contained
7 fentanyl for whatever that's worth.

8 THE COURT: Oh, just fentanyl. What exactly is
9 that anyway?

10 MR. HARTMAN: Fentanyl is a synthetic opioid, it's
11 different from heroin, it's another pain medication. It's
12 used on the battlefield for soldiers who are injured. It
13 works like heroin, it's just a much more potent opioid.

14 THE COURT: All right.

15 MR. HARTMAN: But it's chemically distinct. It's
16 a different substance.

17 THE COURT: So the Government's theory quite
18 clearly is not, because there was fentanyl in these corpses
19 it must have been Mr. Sica's drugs. At the same time the
20 defense is certainly entitled to argue that whatever killed
21 these people could have come from someone else and the
22 question is whether it's discoverable that the government is
23 aware of other potential suppliers of fentanyl and whether
24 that is either Rule 16 or *Brady*. I always like to keep
25 things simple just to help in my own mind, so to use an easy

1 example, if the defendant were charged with robbing the
2 Chase Manhattan on Mamaroneck Avenue, the fact that somebody
3 else robbed banks wouldn't be discoverable and wouldn't be
4 *Brady* absent some unique MO or some other reason to believe
5 that that other person was connected to the Chase Manhattan
6 robbery the defendant was charged with. So, for example, if
7 there was video of somebody else who was a bank robber
8 casing that Chase Bank around the relevant time, then I
9 would say, yes, that should be turned over. But just the
10 fact that there's another person in White Plains who robs
11 banks doesn't entitle the defendant to that guy's name and
12 reports and all that. Likewise if, you know it seems to me
13 in this case, if the people who died if there was any reason
14 to believe that they had other sources, it seems to me that
15 would be discoverable. But just the fact that there are
16 other drug dealers in Dutchess County with no connection to
17 these people wouldn't seem discoverable. So I'm thinking
18 that, if there's any evidence connecting other heroin slash
19 fentanyl dealers to these three victims, that would be *Brady*
20 in the sense that it suggests an alternative suspect and
21 that seems to me should be turned over.

22 I don't know if there is. But, for example, if we
23 had the victims' phones and it seems like they have other
24 contacts who are drug dealers, that should be apparent and
25 if the -- well not apparent, but that should be discernible,

1 and to the extent those people are known to the government
2 and there's information about who they sold to or what they
3 sold, I would think that would be discoverable. If there's
4 no connection, I don't know.

5 Let me try to get my arms around what we're
6 talking about.

7 In this case the Government's charged that three
8 deaths resulted from the drugs distributed by the defendant.
9 How many other overdoses in the general timeframe were there
10 in the general area? I mean, talking about five, are we
11 talking about 50?

12 MR. HARTMAN: Judge, if I could confer with
13 Mr. Schmidt, he probably has a better sense of this.

14 THE COURT: Sure. He can come up.

15 MR. HARTMAN: Judge, it's our understanding that
16 the DEA was investigating about 20 to 30 overdoses, not
17 overdose deaths, but 20 to 30 overdoses that were heroin or
18 fentanyl --

19 SPECIAL AGENT SCHMIDT: Related.

20 MR. HARTMAN: Not exclusively heroin, not
21 exclusively fentanyl, but heroin or fentanyl or some mix.

22 THE COURT: And in how many of those cases do you
23 think you know who the supplier was?

24 MR. HARTMAN: Not many. Judge, I mean, the
25 exhibits that were turned over erroneously in this case were

1 connected with an investigation where we did believe we knew
2 who the supplier was. There's a person who was supplying,
3 we believe, pure fentanyl. We don't have any reason to
4 believe that supplier was connected with the deaths that
5 were at issue in this case. We didn't find any connection
6 between that individual and these victims.

7 THE COURT: So, let me ask Mr. Green, what exactly
8 are you asking for? I mean, you're not asking for the name
9 of every heroin dealer in Dutchess County I assume.

10 MR. GREEN: Well, we're asking for information on
11 those particular drugs.

12 THE COURT: What particular drugs?

13 MR. GREEN: The drugs that were involved in those
14 20 or 30 cases that the government knows, has just mentioned
15 or -- well we also understand from newspaper reports that
16 actually there were many more than that in Dutchess County
17 reported.

18 THE COURT: Well what timeframe are we talking
19 about? I mean, every overdose --

20 MR. GREEN: I would say in late 2013 and into
21 2014. The thing is that --

22 THE COURT: Well I guess there's a few concentric
23 circles of information here. There are people who sell
24 heroin, which is a larger group than people who sold the
25 heroin that resulted in overdoses, and then there's an even

1 smaller group, which is, people who sold the heroin that
2 resulted in overdoses who the Government's been able to
3 identify and then an even smaller group of those who have
4 been charged. And I do think there's -- whether or not
5 they've been charged is relevant. If I tell them, give
6 Mr. Green the name of everyone you suspect is a drug dealer
7 but some are still on the street or being investigated, that
8 could be a slightly dicey thing. But what reason --

9 MR. GREEN: Well the government has a theory that
10 there was fentanyl or heroin-fentanyl and fentanyl found in
11 two of the people who are deceased, there was only heroin
12 found in the others, in the other, but the government is
13 trying to work on a theory that there could have been
14 fentanyl there. You know, their theory, they've developed a
15 theory against Mr. Sica that seems to make a fentanyl or
16 possibly a heroin-fentanyl mix as a marker of the particular
17 drug that they're alleging that was sold in this case.

18 THE COURT: I don't know, the way I understood
19 their theory is it was Breaking Bad that was the marker, the
20 brand, not just the existence of heroin.

21 MR. GREEN: But the way that they're going to try
22 and circumstantially prove it is partly through the
23 toxicology results which they're going to offer which
24 contained, which, if they indicate fentanyl, the
25 Government's going to argue that that's a marker of, or an

1 MO, if you will, with respect to our client. That's going
2 to be their allegation and their theory.

3 THE COURT: Well I thought that they expressly
4 disavowed that theory that they were not going to be arguing
5 fentanyl means --

6 MR. GREEN: Well how they characterize it --

7 THE COURT: Mr. Sica.

8 MR. GREEN: This is the way it's going to come out
9 at trial, I expect, based on reviewing the evidence.
10 They're going to be offering autopsy results --

11 THE COURT: Well, let's ask.

12 MR. GREEN: -- toxicology reports.

13 THE COURT: Are you going to be making the
14 argument that because there's fentanyl in it it must be
15 Mr. Sica or are you going to argue there's fentanyl in it
16 that's consistent with Mr. Sica?

17 I understand you're also planning to present
18 direct evidence it was Mr. Sica, but what are you going to
19 argue about fentanyl?

20 MR. HARTMAN: Judge, I think what we'll say about
21 fentanyl is that we have samples of Breaking Bad that we
22 have recovered that we have tested --

23 THE COURT: From end of January, beginning of
24 February.

25 MR. HARTMAN: That's correct. Not from December

1 or from November, from early February, that contain a mix of
2 fentanyl and heroin. That's consistent with what is found
3 in the bodies of Laura Brown and Tom Miller, both of whom,
4 as to whom we have direct evidence that they purchased drugs
5 from Mr. Sica.

6 THE COURT: Right. But, I mean, I'm gathering,
7 maybe I'm wrong, I'm gathering that what this trial is
8 really going to be about is not so much whether these people
9 got drugs from Mr. Sica, I mean I understand that is an
10 issue, but the big issue is whether the drugs they got from
11 Mr. Sica are what killed them and that's -- you know,
12 obviously the defendant is going to want to argue that there
13 were alternative sources, and I imagine you've got to need
14 something more than that, Mr. Green, to make it
15 discoverable. I mean every case with a death-resulting
16 charge there will be alternative sources, that doesn't mean
17 the government has to turned over all the information about
18 all the drug dealers in the neighborhood.

19 MR. GREEN: Well we see evidence in the discovery
20 that there were alternative sources, that there were other
21 forms of drug packaging found or that people were reaching
22 out to the people as potential sources of drugs. The notion
23 that --

24 THE COURT: Look I don't think there's any
25 question the government has to turn over any information

1 suggesting that these three victims had other sources. That
2 seems clear to me. So if Breaking Bad and some other brand
3 were found in somebody's house and the government knows the
4 source of the some-other-brand, that, it seems to me, they
5 have to turn over. But what you're asking for is so broad
6 you're asking for the name of anyone else in the area who
7 dealt that substance even with no reason to think that there
8 was any connection between that substance and the people who
9 died. So that just seems way too broad to me. And you
10 haven't given me any authority for the proposition that
11 you're entitled to that, so I don't think, you know, if
12 somebody's found OD'ing in Manhattan of a heroin-fentanyl
13 mix, the government doesn't have to call up the NYPD and
14 say, give us the name of everybody who sold heroin with
15 fentanyl mixed in it just because one of those other people
16 might be the source and the government doesn't have to turn
17 over all the reports relating to all those people. There
18 has to be some, it seems to me, connection before those
19 reports become relevant.

20 MR. GREEN: I think we need to look at the
21 reports.

22 THE COURT: Well it doesn't work that way. I
23 mean, I'm giving you a very simple example: Philip Seymour
24 Hoffman turned up dead, I'll give you that example. He OD'd
25 on heroin. Is the guy who was charged with selling him that

1 heroin, would the NYPD have had to give over the reports of
2 every other heroin dealer in Manhattan? Of course not.
3 It's just way, way too broad and it's not -- which is not to
4 say that you can't defend by saying the government hasn't
5 proven we were the source or there were other sources, but I
6 don't think it means the government has to turn over reports
7 relating to anybody in the vicinity who might have been
8 dealing the similar substance. If there's any whisper of a
9 connection between any of those dealers and these victims,
10 then it's an entirely different story and then I do think
11 they need to turn it over.

12 MR. GREEN: One moment, Judge.

13 MR. WILLSTATTER: Your Honor, unless the defendant
14 can obtain the information concerning other seizures of
15 heroin and fentanyl in Dutchess County and attempt to tie
16 them up to the victims in this case ourselves, other than
17 that, relying strictly on the good faith of the government
18 to decide whether or not something is related or
19 unrelated --

20 THE COURT: Well that's what *Brady* does. I mean,
21 there's *Brady* and there's Rule 16.

22 MR. WILLSTATTER: Well we think the material is
23 material to the defense because it's up to us to advance the
24 defendant's right to present a defense. We're the ones who
25 are responsible for defending Dennis Sica. Once we get the

1 information, it is the Court who will decide whether or not
2 that information is admissible, but to prevent us from
3 obtaining the information in the first place and attempting
4 to see if we can come up with something that might be
5 helpful to the defense is going to hamstring us because
6 otherwise --

7 THE COURT: Well answer my question then. Do you
8 think that every heroin dealer in Manhattan is relevant to
9 the defense of the guy who's charged with supplying Philip
10 Seymour Hoffman?

11 MR. WILLSTATTER: I do not.

12 THE COURT: Or is there some limiting principle?

13 MR. WILLSTATTER: I do not, but in this case
14 they're alleging an unusual combination of heroin and
15 fentanyl in Dutchess County, New York in a limited time
16 period and from reading their complaint it is apparent that
17 the government is alleging that that Breaking Bad was the
18 source of all these deaths and it is a terrible thing this
19 particular person did. When, in fact, according to the
20 information we have developed, as is well-known to the
21 government, there were many other sources of heroin and
22 fentanyl in that county, there were at least ten deaths, not
23 three as are limited in this case, but during the period of
24 time during approximately November and spring of 2014,
25 November of 2013 to the spring of 2014, there were some

1 reported ten deaths in Orange County and more in other
2 counties in the surrounding areas of the Hudson Valley and
3 some 260 overdoses reported in the County of Dutchess. So
4 there are -- and, you know, many of those, according to the
5 published press reports, were linked to heroin-fentanyl
6 mixes. And so we know that the victims in this case were
7 regular users of heroin and apparently and possibly regular
8 users of heroin-fentanyl mixes. So they had other sources
9 that could have caused their deaths. And unless we know
10 where -- you know, the government has this information
11 already. They with decide what is helpful to them and what
12 is not helpful to them. Pointedly, their papers over and
13 over again talk about what their theory is but we cannot be
14 bound by their theory.

15 THE COURT: I agree with that.

16 MR. WILLSTATTER: I know the Court knows this.

17 But we have an obligation to Mr. Sica to obtain the evidence
18 and to see if we can develop that evidence in a manner which
19 is admissible at this trial. And naturally the Court will
20 be the gatekeeper of whether that information can be
21 admitted at trial, and we would not attempt to offer
22 evidence that was completely unrelated. No, we were not
23 seeking every heroin dealer but we are seeking, and we're
24 not even seeking the names of dealer unless they know
25 they're specifically tied with these particular victims, but

1 when it comes to seizures of heroin and fentanyl in the time
2 period alleged in the indictment, it is entirely relevant
3 for us, that is, material to our defense for us to obtain
4 information that the government already has and can use or
5 not use at their leisure to develop our defense.

6 THE COURT: So now you've narrowed. Seizures of
7 heroin-fentanyl mixtures in fall of 2013, spring,
8 winter/spring of 2014.

9 Why shouldn't the government have to turn that
10 over? Reports of such seizures. I don't know how many
11 there would be.

12 MR. HARTMAN: Judge, if you could just give us one
13 second.

14 Judge, I think that's -- what we could do is we
15 could collect information about seizures of fentanyl-heroin
16 mixes in Dutchess County during the period from October --

17 THE COURT: October 1, '13 through --

18 MR. HARTMAN: February 2 or 3rd. I mean,
19 that's -- I mean --

20 THE COURT: Well the date of Mr. Sica's arrest;
21 how's that? Which is what, the 4th?

22 MR. HARTMAN: I think that's February 2. We can
23 do that. Certainly DEA has some of those and the Dutchess
24 County Sheriff's office which we worked with. We can
25 inquire of them.

1 THE COURT: I'm not going to make you go out to
2 each individual department, but the County and I would
3 imagine maybe the lab is a good place to centrally find
4 that, but it seems to me the DEA and the sheriff and maybe
5 the big cities, you know, Poughkeepsie. But I'm not going
6 to make you go to every little hamlet and ask. But all
7 right, that seems reasonable to me.

8 MR. HARTMAN: And, Judge, if I can --

9 THE COURT: You know, I won't give you a formal
10 deadline but do it with all -- I don't want to say with all
11 deliberate speed because I think historically that was
12 interpreted as take your sweet time and I don't want to you
13 take your sweet time.

14 MR. HARTMAN: We will do it as quickly as
15 possible.

16 THE COURT: All right. And turn it over on a
17 rolling basis.

18 MR. HARTMAN: We will do that, Judge.

19 As far as what we turn over, I mean, we'll discuss
20 that with defense counsel. I think there is a concern that
21 the Court raised earlier about ongoing investigations into
22 individuals who are not arrested. I mean, we can certainly
23 turn over property vouchers or lab results that indicate
24 mixes that were seized.

25 THE COURT: Well to the extent there was an arrest

1 associated with the seizure and it's public, you should turn
2 over that as well. If you have seizures that are not
3 associated with any name, obviously you can't give a name.
4 If you have seizures that are associated with a name but
5 there's a reason why you don't want to make that available,
6 such as, you know, there's a wiretap up on that person's
7 phone or whatever, you know, you'll have to come to me.

8 MR. HARTMAN: Okay. Thank you, Judge.

9 THE COURT: All right, the next aspect of the
10 letter relates to what the defendant calls a new theory from
11 the medical examiner and what the government says is an old
12 theory of the medical examiner having to do with the fact
13 that there was no fentanyl in drugs that killed Mr. Del --

14 MR. WILLSTATTER: Dellello.

15 THE COURT: Dellello. And I gather the medical
16 examiner's file included some notes of a conversation he had
17 had with the government about whether the fact that there
18 was no fentanyl in that gentleman's body meant that he had
19 not ingested any fentanyl or whether he might have ingested
20 it but whether there were reasons why it might not show up
21 on autopsy and the medical examiner came up with some
22 possibilities as to why it might not have shown up.

23 Defendant argues this should have been disclosed
24 as *Brady*. I mean, the fact there was no fentanyl in his
25 body was disclosed in June of 2014, I gather. I'm not sure

1 there's anything exculpatory about the medical examiner's
2 speculation. Obviously it is Rule 16 material if the
3 medical examiner is going to be asked about it and that kind
4 of segues into another issue raised later in Mr. Green's
5 letter about the expert disclosure and it seems that what
6 the government has done is it's turned over for its
7 chemists, its toxicologists and its medical examiners the
8 laboratory reports and the CVs but that's it. And you know
9 the rule says you have to turn over a written summary of any
10 testimony that the government intends to use. So if the
11 government doesn't intend to ask anything beyond the four
12 corners of those reports, that's fine, but if, for example,
13 the government were to ask a question like what might
14 explain the absence of fentanyl, if that information was not
15 provided to the defendants in advance, I'm going to preclude
16 it. So it seems to me it's a risky proposition to just say
17 that what's in the reports is a summary of the testimony.
18 But that's, you know, that's up to the government. If, for
19 example, the chemist says, well, I ran this test and that
20 test and the other thing and here are the results and you
21 want to ask the witness to say, well, what do these tests
22 measure and how they work and that's not in the report, you
23 may well have an objection sustained. So if there's
24 something that's outside the reports it seems to me you
25 ought to summarize it for the defense. I'm going to hold

1 them to the four corners of what's been turned over.

2 And, you know, if the reports do not, I obviously
3 don't have them, but if they don't set out the bases and
4 reasons for the witness' opinions, that has to be turned
5 over, too. You can't just turn over a piece of paper that
6 says, you know, the drunk driver's blood alcohol was .08.
7 You've got to turn over what the witness is going to say
8 about why he's concluded that it's .08 and what the bases
9 are for that opinion. So I'm not at all sure that the
10 government has met its Rule 16 obligations with the experts,
11 but the way I police that is I preclude at trial anything
12 that hasn't been summarized and/or for which reasons and
13 bases for opinion have not been provided.

14 So, you know, I don't want to tell you how to do
15 your job but you know how I'm going to look at this. And
16 I'm not saying you have to give a script where here's what
17 he's going to say about what chromatography is, but you have
18 to say the witness is going to explain how chromatography
19 works.

20 MR. HARTMAN: Your Honor, based on what you just
21 said about what you require in terms of the disclosure, I
22 think we would like to expand on what we've done so far and
23 we'll do it as soon as we can.

24 THE COURT: That's probably prudent.

25 Now cellphone records. I gather we have four

1 categories of cellphone-related issues. One is cell site
2 and call detail records that have already been turned over
3 that are voluminous. One is I think moot because one was
4 the defendant's request for the full extraction reports from
5 the seized cellphones and the government is going to turn
6 those over today, it says. Except I gather you're taking
7 out embarrassing selfies or whatever that's in there. But
8 if there's anything, you know, arguably related, even if
9 it's embarrassing, it should be turned over. If it's
10 completely irrelevant, obviously you can not turn it over.

11 Third is the bit-by-bit images, and those were
12 just recently requested. The government has turned over one
13 and is going to turn over the rest by a week from today.

14 How long does it take a tech person to create
15 whatever report he or she wants to create?

16 MR. HARTMAN: Judge, we believe that, based on our
17 conversations with the Dutchess County Sheriff's office, we
18 believe that they can do it within the next week.

19 THE COURT: No, I'm saying like you, as I
20 understand it, when you have these bit-by-bit images, you
21 use this program Cellebrite which extracts everything that's
22 in it. Is that lengthy process or is that a press of a
23 button?

24 MR. HARTMAN: It is a press of a button. I think
25 sometimes it can take a couple of hours. I mean, what

1 they're going to do to generate these bit-by-bit images for
2 the phones for which it wasn't preserved is to engage in the
3 Cellebrite process again. So, as I understand it, the
4 program actually creates in bit-by-bit image.

5 THE COURT: I see.

6 MR. HARTMAN: And then generates the report off of
7 that.

8 THE COURT: So I guess I'm not clear, Mr. Green
9 and Mr. Willstatter, what you want to do with these
10 bit-by-bit images that's different from what the
11 government's already done or do you just want them to do it
12 and give it to you?

13 MR. WILLSTATTER: Our experts are requesting the
14 physical bit-by-bit images of these phones to do their own
15 testing on them, to do their own searches on them. That's
16 what they want to do.

17 THE COURT: So they don't need the physical phone
18 but they want the image.

19 MR. WILLSTATTER: Yes, it's the image of the
20 phone. If they had the physical phone they would have to
21 extract the --

22 THE COURT: You're entitled to it. You're entitle
23 to inspect and copy. You'll have that next Friday.

24 MR. WILLSTATTER: That's what they want.

25 Couple things of on this. One is, we've noticed

1 in the letter yesterday from the government that for the
2 first time they revealed to us that they have iPhones that
3 belonged to Laura Brown and Thomas Miller. They say in
4 their letter that they couldn't access them because, like
5 everybody else's iPhone, it's password protected; however,
6 in speaking to our experts, what we have learned is that
7 Apple can get around that with a subpoena or an order from
8 the Court.

9 And, secondly, that almost everybody's iPhone
10 through WiFi links an iCloud account.

11 THE COURT: If they have one; right?

12 MR. WILLSTATTER: If they have one. But the way
13 the phone works is you have to set an iCloud account when
14 you first get it or most of the functions on the phone don't
15 work.

16 THE COURT: So does that mean that I have one? I
17 don't even know that I had one. My phone works.

18 MR. WILLSTATTER: If you want to make an app you
19 have to use that password to get, you know, to download an
20 app, like MLB, whatever you like, well that is through our
21 iCloud account. And so what happens is that there is an
22 image on the server of the person's iCloud account.

23 So it's even quicker for Apple to obtain the image
24 of the iPhone through the person's iCloud account, and even
25 if they don't, even if we don't know the person's user name

1 and password, it's just physically easier, I'm told by our
2 experts, for Apple to acquire the image from the iCloud as
3 opposed to searching it.

4 What they tell me is that there is a function
5 that, if you find out how to do it, you could make it so
6 that, if you tried ten times to access your phone with a
7 series of numbers, after ten times it wipes your phone.
8 Right? But you have to know how -- I didn't even know it
9 existed. Okay? Unless the person set that up, like maybe
10 they were Russian spy or something, they had some data that
11 they really needed to keep secret, maybe they worked for the
12 Government or something like that, any person whose like a
13 normal citizen who has an iPhone, unless they have that set
14 up, there is a program that our experts have that will go
15 through the combinations and can access the iPhone. And it
16 does take time to do that, it can take days to do that. And
17 you have to have, you know, you have to have access to the
18 phone to do that. The government can do that.

19 THE COURT: Sounds like it would be easier for the
20 government to do it.

21 MR. WILLSTATTER: Yes.

22 THE COURT: But are you planning to do that,
23 Mr. Hartman, Mr. Allee?

24 MR. HARTMAN: Judge, we don't plan to do that. We
25 tried to get in the phones at the time and we weren't able

1 to.

2 THE COURT: Now you know that you could subpoena
3 Apple and they'll give you the magic word. If you're not
4 interested in looking at it, then they may come to me and
5 ask me for a subpoena.

6 MR. WILLSTATTER: We would do that. So our point
7 is that we need to get those things.

8 THE COURT: These are the victims' phones.

9 MR. WILLSTATTER: Yes, they are.

10 THE COURT: That seems like -- well I want to talk
11 about rule 17(c) in a moment.

12 MR. WILLSTATTER: If the victims were in touch
13 with other persons who were drug suppliers, that could be
14 material to the defense.

15 THE COURT: Yeah, it sure sounds like it.
16 Something that, if I were the government, I'd want to rule
17 out, or if it was out there, I wouldn't want to be surprised
18 by it at trial.

19 Look, the defense can subpoena it and it would
20 show up here on the morning of trial and you wouldn't even
21 know about it or they could subpoena it ahead of time if it
22 met the requirements. I think, given that we're talking
23 about the victims' cellphones, if the government isn't going
24 to get those contents, I'm going to authorize the defense to
25 do it which would -- do you physically need the phone to do

1 that?

2 MR. WILLSTATTER: I think the phone has to get
3 sent to Apple unless they're going to try to do it through
4 the iCloud in which case they might -- I'm not 100 percent
5 sures on this.

6 THE COURT: I'll give the government the choice.
7 But we're talking about the victims' cellphones and it seems
8 to me both sides would want to look into that phone to see
9 if the victim had other sources and if there was any
10 communication around the relevant time with the other
11 sources. If you've got a text in there that says, you know,
12 to a third person saying, like, I've used up all my Breaking
13 Bad, can I get something else from you, before the death,
14 that's pretty huge for the defense. Likewise, if there's
15 nothing like that in there, that's pretty huge for the
16 government. So I'll let you inform -- I'll let the
17 government inform the defense on Monday whether it's going
18 to do it or whether it's not. And, if not, I'll sign
19 whatever I need to sign for the defense to do it.

20 Now with respect to the stuff that has been turned
21 over, which is the cell site and call detail records for a
22 bunch of phones, including the Rohlman phone -- let me back
23 up and ask a question.

24 Does call detail includes the contents of texts
25 and emails?

1 MR. HARTMAN: No, Judge, it's just the actual
2 transaction. So it will show time, text message or call,
3 toll versus text. And it will show the length of the
4 communication if it's toll.

5 THE COURT: The Rohlman cellphone you have the
6 actual texts and the emails.

7 MR. HARTMAN: Yes.

8 THE COURT: And were those extracted from the
9 phone? Not the phone company.

10 MR. HARTMAN: They were extracted from the phone.

11 THE COURT: Okay. So the first argument is that
12 the call detail and the cell site information is voluminous
13 and defense has to confer with its own experts and they need
14 time for that.

15 Do you have, Mr. Green, any sense of how long your
16 experts are going to need with this material?

17 MR. GREEN: We do. We spoke with the expert very
18 recently. After they get all the materials, which is still
19 coming in on a rolling basis, I think conservatively they
20 would need about two weeks to process it so that they could
21 put it into a usable form and then at least another two to
22 review it and confer with us about it. So, a minimum of, I
23 think a bare minimum of four weeks but probably longer.
24 Four-to-six weeks, your Honor.

25 THE COURT: All right. And this report of

1 Mr. Rohlman's phone I gather it's a lot of pages, but the
2 Government's suggesting that, like the sample they attach to
3 their letter, that a lot of those pages are computer
4 gobbledygook and that, you know, it's not really 5000 pages.

5 MR. GREEN: It's many, many more pages and many
6 more calls and texts than what we originally had.

7 THE COURT: That's clear. That's clear.

8 MR. WILLSTATTER: Let me see if I can help here,
9 your Honor. What the experts have explained to us is that
10 the format that the government gave it to us a lot of this
11 is really hard to understand, but when we have the experts
12 for want of a better word break this down for us, they're
13 going to be able to help us understand what a lot of this,
14 what looks like gibberish, means. You know, so, we have
15 to -- they provided this what's called an extraction report,
16 but that's the format that they decided to send it to us.
17 Our experts need to compare the physical data phones to the
18 CDR reports or call detail records reports and the historic
19 cell site data to put it all together in order to process
20 all that data and be able to come to us and explain to us
21 how it all fits together. Like what some of these messages
22 mean. We can't tell, a lot of this stuff is just looks like
23 gibberish, as I'm saying, you can't make any head nor tail
24 out of it, that's because of the format that it's produced
25 in.

1 THE COURT: Well, I'm looking at it. Like most of
2 the gibberish that takes up the two middle pages and top of
3 the third page and starts on the bottom, it looks like a
4 short email: Hi, just a reminder that you're receiving this
5 email because you've expressed an interest in
6 *HeadlineHerald*. Don't forget to add us to your address
7 book. And the rest is code. It's like the font and all --
8 it's code. So I don't know that that email has any
9 relevance at all or that those three pages have any
10 relevance.

11 MR. WILLSTATTER: Maybe that's true, but there is
12 much data that needs to be assimilated and it's not just
13 from one source. The data that you get from the phone has
14 to be compared with the call detail records and the
15 historical cell site information and put into a format that
16 we can use it.

17 THE COURT: Right they're going to put it all in a
18 database and make sure it matches and all that. I get that.
19 That takes time. I'm not saying it doesn't need to be done,
20 I'm just saying it does look like, of course I only have
21 this one extract, but it does look like two of those four
22 pages you wouldn't have to study.

23 All right, and the last question is summary charts
24 and I think turning those over with the exhibits is fine.

25 So, let's talk about the trial date. Right now

1 it's about three weeks away, four weeks away. Three, I
2 guess. And I can see that some additional time is going to
3 be necessary; however, I am starting another trial June 1,
4 that's four-to-six weeks and August is pretty much out for
5 me. And I don't want to wait until September. So I'm not
6 pushing this 60 days but I can push it -- I can probably
7 push it off a month, which it seems to me should be enough
8 time given not only the lawyer power but the expert power
9 that --

10 MR. GREEN: Excuse me, can I clarify? The
11 four-to-six week estimate that we got from our experts--
12 that's after they get all the stuff, which we're told that
13 things are going to be coming in February 27 and --

14 THE COURT: Well they can start.

15 MR. GREEN: Estimate may be later than that.

16 THE COURT: They can start putting in their
17 database what they have now and as they get new things
18 they'll do it on a rolling basis and it will be complete
19 hopefully in early March and then they'll have more than
20 four weeks.

21 Does anybody have conflict, vacations or other
22 problems, in April or May that I need to work around?

23 MR. WILLSTATTER: Yes.

24 THE COURT: And what are they?

25 MR. WILLSTATTER: The 17th through the 19th I will

1 be away, so I really don't want to start immediately after
2 that.

3 THE COURT: Well, that may be unavoidable.

4 All right, anybody else?

5 MR. WILLSTATTER: What about May 4?

6 THE COURT: I just want to hear about anybody
7 else's issues. Okay.

8 I mean, my guess is we're talking -- I still think
9 two weeks with all these experts is a little optimistic, so
10 I want to leave three. I have a graduation in mid-May that
11 is going to have me out for one or two days. How about
12 April 27?

13 Is that all right?

14 MR. HARTMAN: It's fine for us, Judge.

15 MR. GREEN: Yes.

16 THE COURT: April 27 it is. Let's adjust all the
17 other dates.

18 MR. WILLSTATTER: One point on the summary charts
19 is that, you know it would be important for us to have the
20 summary charts because sometimes it's not clear what they
21 emanate from. So if they're summary charts based on
22 cellphone or cell site evidence, we would need to know sort
23 of where it's coming from --

24 THE COURT: If they're going to go into the jury
25 room, it needs to be clear where it's coming from. I mean,

1 what I usually see the government do, they put on the chart
2 the exhibits from which they extracted the information.

3 Look, these charts have to be turned over in
4 sufficient time that the defense can check the Government's
5 work, but if you get a chart March 1 that says this
6 information comes from Exhibit 522 and you don't have
7 Exhibit 522 until March 9, you're not going to be able to do
8 much with it. What I'll do is, since we now have a little
9 more time, is I will have the government turn over its
10 exhibits a little further in advance of trial.

11 We originally had motions *in limine* coming in on
12 Monday. I can leave that if everybody has already done them
13 or if they were going to be working all weekend on them, I
14 can push that off a little.

15 When Alice comes back out, I'm going to ask her
16 for a final pretrial conference. Or Jen can do it. Let's
17 see, can you find me, we're now going to start the 27th. So
18 can we have a final pretrial conference maybe like the 22nd?
19 What are we doing April 22?

20 All right, final pretrial conference 11:00 a.m. on
21 the 23rd of April. 3500 material --

22 MR. HARTMAN: I'm sorry, Judge, you said the 23rd
23 for the final pretrial?

24 THE COURT: Final pretrial 11:00 a.m. on the 23.

25 Actually, you know what, I'm sorry, because we

1 have more time, let's make that earlier. I think it's
2 better for the lawyers to know the rulings on the motions
3 *in limine*. What do we have like around the 15th, 16th in a
4 that area? Let's say 9:30 on the 16th. April 16 at 9:30
5 will be the final pretrial conference and that way you'll
6 have time to absorb the rulings on the motions *in limine*.
7 So working backwards from that, why don't we say, how about
8 motions *in limine* March 2 and opposition March 16. Requests
9 to charge and *voir dire* questions March 23.

10 MR. WILLSTATTER: *Voir dire* and what did you say,
11 Judge?

12 THE COURT: *Voir dire* and request to charge
13 March 23; Government exhibits, April 13; 3500, April 20th.

14 Let me say those again. Motions *in limine*
15 March 2; opposition, March 16; requests to charge and
16 proposed *voir dire* questions, March 23; government exhibits,
17 March 13; final pretrial conference, March 16; 3500 --
18 excuse me, April, April 13 for the government exhibits;
19 April 16 for the final pretrial conference; April 20 for the
20 3500; April 27 for jury selection and trial.

21 While we're on the subject of jury instructions, I
22 had gotten at the end of January a letter from Mr. Green and
23 I got a response in mid-February from Mr. Hartman regarding
24 whether the indictment was duplicitous or whether it would
25 be cured by a special verdict and also raising a question of

1 the death-resulting charge conceivably being found without
2 the jury finding actual distribution.

3 So, the duplicity issue arises from the
4 possibility that some jurors could find that Victim One's
5 death was caused by the defendant's drugs and other jurors
6 Victims Two or Three without all 12 being unanimous, but the
7 government in its letter, I wouldn't say agrees with the
8 defendant but agrees it would be prudent to charge the jury
9 that they need to be unanimous as to any individual death
10 resulting from the offense and that a special verdict
11 requiring such unanimity is appropriate. So I think that
12 takes care of that.

13 And then the other argument is, well, the charge
14 is conspiracy to distribute or possess with intent to
15 distribute and I guess I'm a little confused about what the
16 defendant's concern is because I don't understand how -- a
17 jury can't find that death resulted from the conspiracy
18 without finding that somebody distributed. Obviously the
19 fact that somebody's got the drugs in their pockets isn't
20 going to kill anyone. I mean, I can certainly instruct the
21 jury that they shouldn't consider whether death resulted as
22 to a particular defendant without finding actual
23 distribution either by the defendant or by a co-conspirator
24 for whose actions he's responsible, but I don't know why
25 that wouldn't solve the problem. I don't think they have to

1 find that the defendant personally handed the drugs.

2 Do you think that solves the problem if I
3 instruct: You should only consider whether death results if
4 you find -- I'm writing this down -- the defendant or a
5 co-conspirator for whose conduct the defendant would be
6 accountable actually distributed drugs to that victim or to
7 that individual. I think it solves the problem.

8 MR. GREEN: Your Honor, the concerns in that
9 letter had to do with whether the indictment charging the
10 conspiracy is duplicitous because it charges both a theory
11 of possession with intent to distribute and a conspiracy
12 theory of distribution.

13 THE COURT: Well, it can't be duplicitous because
14 it's a multi-object conspiracy.

15 MR. GREEN: Well I think the reason is because, I
16 think the reasoning of the district court cases that I cited
17 in that letter was that, because of the aggravating element
18 that requires a distribution and that you can't have a --
19 and because that's considered a separate crime under the law
20 under *Apprendi*, you can't have an indictment that alleges
21 both because one is an impossibility with respect to the
22 aggravating charge. The mere possession with intent to
23 distribute as a basis for convicting someone is, those cases
24 consider it or if they don't consider it a legal
25 impossibility they consider it essentially charging two

1 different offenses. I know that your Honor --

2 THE COURT: Why is an instruction to the jury that
3 you can't find death resulting without finding an actual
4 distribution solve that problem? It would require a jury
5 finding, so it's not an *Apprendi* issue, and it solves the
6 possibility problem because there's no way the jury will
7 find death resulted if the drugs weren't distributed.

8 MR. GREEN: Because you have another theory in
9 there of possession with intent to distribute which can't be
10 a basis for the aggravating charge.

11 THE COURT: Exactly, which is why I'm telling them
12 you have to find distribution before you can --

13 MR. GREEN: But I think those cases also, that's
14 why those courts also believe that it was duplicitous
15 because --

16 THE COURT: Well those weren't conspiracies.
17 First of all --

18 MR. GREEN: I think one -- I thought one of them
19 was.

20 THE COURT: I mean, *King* was a substantive count,
21 but regardless distribution and possession with intent to
22 distribute are two different ways of violating the same
23 statute. I'm sure if this were a substantive distribution
24 the government could break it up and say distribution with
25 death resulting and possession with intent to distribute.

1 But here we have a conspiracy. I'm essentially going to
2 break it up the same way in the instructions. I'll make
3 sure the jury understands that before they can find that
4 this offense resulted in someone's death they have to find
5 that a conspirator actually distributed the drugs that
6 caused the death. You're not saying, I don't think, that
7 the defendant has to personally have distributed the drugs,
8 he just has to be accountable for them either because he's a
9 co-conspirator or he had, he aided and abetted or he
10 willfully caused or something.

11 MR. GREEN: We'll flesh that out in our request to
12 charge, but obviously it can't be a mere possession.

13 THE COURT: Obviously. Right. All right, I think
14 we're in agreement.

15 And the last thing I want to talk about, and I'm
16 going to be cryptic because I've gotten a *ex parte*
17 application for some subpoenas from the defense, and I'm not
18 going to tell the government what they are for; however, I
19 don't think that the application addresses an issue I'm
20 concerned about and but which I haven't dealt with in a
21 while and I want the government to give me some law on. And
22 the government will be doing it in a vacuum because they
23 don't know what the request is, but my memory of what you
24 can ask for via a 17(c) subpoena to be returnable in advance
25 of trial is that it has to be evidentiary and not, you know,

1 investigative and it can't just be, I want to subpoena a
2 bunch of stuff, and if some of it looks good, I'm going to
3 offer it at trial. My memory is you have to have a somewhat
4 more concrete showing you are going to offer it at trial,
5 but my memory is imperfect and I haven't looked at it in a
6 while, so I want to give both sides, frankly, the
7 opportunity to give me the law on how sure it has to be that
8 the subpoenaed material is going to be offered or is it
9 enough that it could be offered depending on its contents?

10 I remember a body of case law saying you can't use
11 a 17(c) subpoena to fish for -- to do investigation or fish
12 for evidence that you may or may not use, but, as I said, my
13 information is not that fresh.

14 So, as to not delay things, I won't ask for that
15 on Monday but I'll ask for it on Tuesday, how's that, which
16 will be the 24th. I'm sure the government has it in its
17 computers, it can just spit it out, since you won't be able
18 to tell me anything more than what the law is, and then I
19 will confer further with defense counsel.

20 That's all I had on my agenda. Anything else we
21 should take up today?

22 MR. HARTMAN: Judge, the only thing is I think we
23 probably need a speedy trial exclusion.

24 THE COURT: Ah, yes, I will exclude the time
25 between now and April 27 under the Speedy Trial Act in the

1 interest of justice. I find the ends of justice served by
2 the exclusion outweigh the best interest of the public and
3 the defendant in a speedy trial because it will enable the
4 defense to obtain and review the materials we've discussed
5 today that are necessary for adequate trial preparation and
6 for both parties to obtain the additional materials we've
7 discussed and for them to prepare.

8 Thank you all.

9 MR. HARTMAN: Thank you.

10 (Proceedings concluded at 4:23 p.m.)

11 C E R T I F I C A T E

12 Certified to be a true and correct transcript of the
13 stenographic record to the best of my ability.

14 -----
15 Angela A. O'Donnell, RPR, Official Court Reporter

16 United States District Court, Southern District of New York
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